No. 88-1666 and No. A-848

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

* * * * *

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

STEPHEN EDWARD LEICHTY,

Respondent.

* * * * *

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR STAY OF ENFORCEMENT OF JUDGMENT, AND TO PETITION FOR WRIT OF CERTIORARI

* * * * *

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RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR STAY OF ENFORCEMENT OF JUDGMENT, AND TO PETITION FOR WRIT OF CERTIORARI

* * * * *

ARGUMENT

I.

PETITIONER WAS NOT ENTITLED TO HAVE THE REMITTITUR RECALLED.

The built-in delay between the time a reviewing court's judgment becomes final and the time a remittitur is issued was designed to give the losing party an opportunity to move for a rehearing or further appellate relief before the reviewing court loses jurisdiction when the remittitur is filed in the trial court. (Blanc v. Bowman, 22 Cal.23, 25-26 (1863).) Because this time delay was put in place to benefit the losing party, the losing party may waive its advantage. (Cal. Civil Code §3513; Muller v. Union Traction Co., 68 Cal.App. 239, 243, 228 P. 731, 732 (1924).) That is exactly what petitioner did here, through inaction. It did nothing to seek a rehearing in the California Supreme Court or appellate review in this Court within the period of time bounded by the California Supreme Court's denial of the People's petition for review on February 15, 1989 and the filing of the California Court of Appeal's remittitur in the San Bernardino County Superior Court on February 27, 1989, following the issuance of that remittitur on February 22, 1989.

Waiver of a known right may be implied from conduct or implied from conduct inferentially manifesting an intention to waive. (Johnson v. Kaiser, 196 Cal. 686, 698 (1925); Salton Community Services Dist. v. Southard, 256 Cal.App.2d 526, 533 (1967).) Petitioner had more than ten days in which to seek further appellate relief before a remittitur was filed in the trial court. Accordingly, petitioner should be held accountable for that inaction.

In California, once a remittitur has been issued by order of the California Court of Appeal and it has been filed in the clerk's office of the trial court, the reviewing court is no longer able to exercise jurisdiction over that case. (Southwestern Inv. Corp. v. City of Los Angeles, 38 Cal.2d 623, 241 P.2d 985 (1955); Kohle v. Sinnett, 136 Cal.App.2d 34, 288 P.2d 139 (1955); Skaggs v. City of Los Angeles, 138 Cal.App.2d 269, 272, 291 P.2d 572, 574-575 (1956); Municipal Bond Co. v. Riverside, 138 Cal.App. 267, 279, 32 P.2d 661, 666 (1934).) At this point, jurisdiction is restored to the superior court. (Riley v. Superior Court, 49 Cal.2d 305, 310, 316 P.2d 956, 958-959 (1957).)

California Code of Civil Procedure section 43 and Rule 25(a) of the California Rules of Court mandate that the reviewing court remit its judgment to the court from which the appeal was taken. A remittitur may not be recalled by the reviewing court, once it has been filed in the clerk's office of the trial court, except to correct clerical errors in the judgment, fraud, mistake, inadvertence (Kohle v. Sinnett, supra; Richardson v. Chicago Packing and Provision Co., 135 Cal. 311, 312, 67 P. 769, 770 (1902); In re Levinson, 108 Cal. 450, 459 (1895); Herrlich v. McDonald, 83 Cal. 505, 506, 23 P. 710(1890); Swain v. Naglee, 19 Cal. 1 (1861)), or "an improvident act which results in prejudicial error or miscarriage of justice" (Pacific Legal Foundation v. California Coastal Com., 33 Cal.3d 158, 165, 655 P.2d 306, 310 (1982)). It is not appropriate to recall a remittitur to correct judicial error. (Id.; Kohle v. Sinnett, supra, 136 Cal.App.2d at p. 35, 288 P.2d at p. 140.)

Nor is a motion to recall a remittitur a proper remedy for correcting an alleged mistake of law. (People v. Stone, 93 Cal.App.2d 858, 860, 210 P.2d 78, 79 (1949).) Once the reviewing court's decision has become

final, the losing party's only remedy is to petition for a rehearing or for higher appellate review in the time permitted by law. (Id., 93 Cal.App.2d at p. 863, 210 P.2d at p. 81; Chin Ott Wong v. Title Ins. & Trust Co., 91 Cal.App.2d 1, 3, 204 P.2d 387, 388 (1949).)

Here there was no clerical error to correct, no fraud, no mistake, no inadvertence, and no improvident act occurring which resulted in any prejudicial error or misscarriage of justice. Without fanfare and with no particular haste, the California Court of Appeal simply did what it was required to do; namely issue a remittitur and promptly forward it to the clerk of the trial court. Petitioner's tardiness in seeking further appellate relief should not be excused.

* * * * *

II.

PETITIONER WILL BE IRREPARABLY INJURED IF THE REMITTITUR REMAINS RECALLED AND IF THE CALIFORNIA COURT OF APPEAL'S JUDGMENT IS NOT QUICKLY ENFORCED.

Respondent never waived his speedy trial rights guaranteed to him by the Sixth Amendment to the United States Constitution; Article I, section 15 of the California Constitution; and California Penal Code section 1382(b). In fact, he insisted upon asserting his speedy trial rights in a written demand for speedy trial filed in the trial court one day before this Court's Order temporarily recalling the California Court of Appeal's remittitur and staying enforcement of its judgment until further notice. (See Appendix 1 here attached and incorporated by reference as part of this responsive pleading as though fully set forth herein.) These rights should be honored. When the stay was granted by this Court, the People of the State of California had already used up 57 or 58 of 60 days in which to timely bring respondent to trial or dismiss the criminal action against him for want of evidence. Respondent should not have to further suffer the stigma of criminal charges pending against him as that may affect him socially and in finding permanent employment following completion of his college work. And he should not have to suffer a possible trial at a time when the memory of himself and other material witnesses is stale, just so petitioner can try to convince this Court to expand existing law or announce a new legal doctrine at his expense

Psychological harm to respondent is also threatened by further uncertainty and fear engendered by a prolongation of criminal proceedings against him. The speedy trial rights enjoyed by respondent should take precedence over any rights the State seeks to assert at his expense.

* * * * *

III.

CERTIORARI SHOULD NOT BE GRANTED, BECAUSE PETITIONER FAILED TO RAISE IN LOWER COURTS ISSUES SOUGHT TO BE PRESENTED FOR THE FIRST TIME HERE.

The United States Supreme Court will not consider a point first raised by the petition for certiorari. (Helvering v. Minnesota Tea Co., 296 U.S. 378, 380, 80 L.Ed. 284, 286, 56 S.Ct. 269, 270 (1935).) This Court has further previously decided that it will not consider an issue on certiorari where the government had not raised the question below. (United States v. Ortiz, 422 U.S. 891, 898, 45 L.Ed.2d 623, 629-630, 95 S.Ct. 2585, 2589 (1975).) And, where this Court is unsure whether an issue raised by a petition for certiorari was presented below, it will not consider such an issue not referred to in the opinions of the courts below. (Ramsey v. United Mine Workers, 401 U.S. 302, 312, 28 L.Ed.2d 64, 71-72, 91 S.Ct. 658, 664-665 (1971).)

Having failed to prevail in California courts in upholding a full warrantless laboratory analysis of bottles that contained an unknown liquid substance previously identified by a warrantless field test as "some sort of drug" but not determined in the field to be contraband, ther employing legal theories ranging from consent search, plain view seizure, and good faith reliance on the validity of a search warrant in a lost effort to retain the fruits of what was deemed by the Californi Court of Appeal and argued by respondent herein to be an unlawful search of personal property over which there existed an expectation of privacy, petitioner now quite creatively seeks to argue for the first time for evolution of the "single-purpose container exception" to the search warrant requirement, and to extend the "vehicle exception" announced by Carroll v. United States, 267 U.S. 132, 153, 69 L.Ed. 543, 551, 45 S.Ct. 280, 39 ALR 790 (1925) and reaffirmed in Chambers v. Maroney, 399 U.S. 42, 50, 26 L.Ed.2d 419, 428, 90 S.Ct. 1975, n. 8 (1970) to packages

consigned to common carriers. Since these arguments were not raised by petitioner in California courts below in the same action in which petitioner now seeks certiorari, this Court should adhere to its previous practice and not grant certiorari to consider these issues first belatedl raised by petitioner now.[1] This Court has announced that it will not review what a state court below did not decide. (Walters v. City of St. Louis, 347 U.S. 231, 233, 98 L.Ed. 660, 664, 74 S.Ct. 505, 507 (1954) That sound policy should be followed here.

* * * * *

IV.

CERTIORARI SHOULD NOT BE GRANTED, BECAUSE PETITIONER SEEKS TO HAVE THIS HONORABLE COURT STRAIN TO EXPAND EXISTING LAW AND ANNOUNCE A NEW LEGAL DOCTRINE ON LEGAL ISSUES NOT SQUARELY BEFORE THE COURT, AND UNSUPPORTED BY THE OPERATIVE FACTS.

Petitioner seeks to turn a sow's ear into a silk purse. The facts just do not support the People's position. For, the package here in issue was not so obviously contraband at all. Until opened, the package did not itself appear to be suspicious. And, even after being opened, the package contained two bottles labeled "high grade two cycle model airplane oil" with a visible yellowish liquid inside the capped and sealed bottles. While probable cause may have existed for officers to seize these bottles, as the Calfornia Court of Appeal so found, the physical appearance of the seized items in this case is far different than that of the obviously contraband white powder contained in a bag in United States v. Miller, 822 Fed.2d 828 (1987); or the burglar tools discussed in Robbins v. California, 453 U.S. 420, 441-442, 69 L.Ed.2d 744, 760, 101 S.Ct. 2841 (1981). The containers here in issue did not clearly "proclaim their contents." (See Y. Kamisar, "'The Auto Search' Cases: The Court Does Little to Clarify the 'Labyrinth' of Judicial Uncertainty," in J. Choper, Y. Kamisar & L. Tribe, The Supreme Court: Trends and Develpments 1980-1981, at p. 104.) And, here no "plain touch" occurred, as in United States v. Williams, 822 F.2d 1174, 1980-1186 (D.C. Cir. 1987).

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[1] Please see lodged copies of Respondent's Brief and Petition for Review and alternative Request for Depublication.

Moreover, if the contraband nature of the items seized at the airport building were so obvious, why would a field test have been deemed necessary by the officers seizing this property? Once a field test has been performed, the People must be bound by an inconclusive result the same as they would hope to take advantage of a result that indicates that contraband is present. After the field test here, the officers had reasonable cause to back off from any further intrusion into the bottles without a search warrant, since their suspicion that the bottles contained contraband was not enhanced. They must suffer the consequences for not having done so, as the California Court of Appeal properly found below.

* * * * *

V.

THE SEARCH AND SEIZURE ISSUE WAS PROPERLY DECIDED BY THE CALIFORNIA COURT OF APPEAL, AND PROPERLY LEFT UNDISTURBED BY THE CALIFORNIA SUPREME COURT.

For all of the sound reasons advanced by the California Court of Appeal in its published opinion regarding this case, the search and seizure issue resulting in the exclusion of evidence was properly decided by that court below. United States v. Mulder, 808 F.2d 1346 (9th Cir. 1987) was properly relied upon, and United States v. Jacobsen, 466 U.S. 109, 80 L.Ed.2d 85, 104 S.Ct. 1652 (1984) was not misconstrued. This Court should not stretch to decide issues that are not factually supported by the record or necessary to reach. Nor should it seek to extend any legal doctrine enunciated in Arizona v. Hicks, 480 U.S. 321, 326, 94 L.Ed.2d. 347, 108 S.Ct. ____ (1987), as petitioner invites it to do. In reviewing a state court's decision, this Court is by its own previous finding "not at liberty to disregard the explicit holding of the state court as to the basis of its decision, except for convincing reasons...." (Guaranty Trust Co. v. Blodgett, 287 U.S. 509, 512, 77 L.Ed. 463, 466, 53 S.Ct. 244, 245 (1933).) No convincing reason exists to deviate from this policy here.

* * * * *

CONCLUSION

For all of the reasons just advanced, and stated in the California Court of Appeal opinion sought to be reviewed, the recall of that court's remittitur should be lifted, the stay of that Court's enforcement of its judgment terminated, and petitioner's petition for writ of certiorari denied.

Respectfully submitted this 5th day of May, 1989,

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

-vs-

STEPHEN EDWARD HALL,

Defendant and Appellant.

TO THE HONORABLE JUDGE OF THE SUPERIOR COURT:

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, STEPHEN EDWARD HALL, hereby petitions this court for a writ of habeas corpus to inquire into the cause of his imprisonment and restraint of liberty. This petition is made pursuant to Penal Code section 1473(b).

DATE: April 29, 1990

Appendix 1

STATE OF CALIFORNIA
COUNTY OF

I am the

the above entitled action. I have

I know the contents thereof, and I certify that the same

is true of my own knowledge, except as to those matters which are therein stated upon

I certify (or declare) under penalty of perjury that the

Executed on

at

California.

I, the undersigned,

STATE OF CALIFORNIA
COUNTY OF San Bernardino

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is

Office of Attorney General
110 West "A" Street
San Diego, CA 92101

That on April 25, 1980

I served the within

Supp. Decl. A.G. [illegible]
and Exh.
Office of Attorney General
110 West "A" Street
San Diego, CA 92101

on April 25, 1980

[redacted]

I, DENNIS S. TILTON, hereby certify that I am a citizen of the United States over 18 years of age, with my law office located in the County of San Bernardino, State of California, in which county I personally mailed a true and correct copy of RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR STAY OF ENFORCEMENT OF JUDGMENT, AND TO PETITION FOR WRIT OF CERTIORARI and MOTION TO PROCEED IN FORMA PAUPERIS in Docket No. 88-1666 and No. A-843 by first class mail, postage prepaid, to all interested parties listed below at the addresses set forth below, and by express mail, postage prepaid, to the Supreme Court of the United States, Attn.: Chief Deputy Clerk Francis J. Lorson, Washington, D.C. 20543 I personally mailed the original and ten (10) copies of each document for filing. A true and correct copy of each such document filed in this cause is hereunto attached. I am not a party to this action. My business address is 157 W. Fifth Street, Suite 310, San Bernardino, California 92408. I deposited for collection and mailing by me in the United States Mail at San Bernardino, California on the 5th day of May, 1989, with postage thereon fully prepaid.

California Supreme Court
350 McAllister Street
San Francisco, CA 94102

California Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth Street
San Bernardino, CA 92401

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I am in a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Bernardino, California this 5th day of May, 1989.

Dennis S. Tilton

DENNIS S. TILTON
Attorney for Respondent
Stephen Edward Lichty

Subscribed and sworn to before me this 5 day of May, 1989.

Renee E. Miller
NOTARY PUBLIC

RENEE E. MILLER
NOTARY PUBLIC - CALIFORNIA
SAN BERNARDINO COUNTY
My Commission Expires March 26, 1993

Appendix 2

[redacted]